

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10	BENJAMIN FRANK BALLARD,)	No. C 08-2550 MMC (PR)
11	Petitioner,)	ORDER DENYING PETITION FOR
12	v.)	WRIT OF HABEAS CORPUS;
13	ROBERT AYERS, JR., Warden,)	DENYING CERTIFICATE OF
14	Respondent.)	APPEALABILITY
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16 On May 20, 2008, petitioner, a California prisoner incarcerated at San Quentin State
17 Prison and proceeding pro se, filed the above-titled petition for a writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254, challenging the 2007 denial of parole by the California Board
19 of Parole Hearings (“Board”). Respondent filed an answer to the petition and petitioner filed
20 a traverse.

21 Subsequently, the Ninth Circuit issued its decision in Hayward v. Marshall, 603 F.3d
22 546 (9th Cir. 2010) (en banc), which addressed important issues relating to federal habeas
23 review of Board decisions denying parole to California state prisoners. After the parties filed
24 supplemental briefs explaining their views of how the Hayward en banc decision applies to
25 the facts presented in the instant petition, the United States Supreme Court filed its opinion in
26 Swarthout v. Cooke, 131 S. Ct. 859 (2011) (per curiam), which opinion clarifies the
27 constitutionally required standard of review applicable to petitioner’s due process claim
28 herein.

1 For the reasons discussed below, the petition will be denied.

2 **BACKGROUND**

3 In 1985, in the Superior Court of Stanislaus County (“Superior Court”), petitioner
4 entered a plea of nolo contendere to second degree murder. He was sentenced to a term of
5 fifteen years to life in state prison. Petitioner did not appeal his conviction.

6 The parole suitability hearing that is the subject of the instant petition was held on
7 February 23, 2007. At the conclusion of the hearing, the Board, after having reviewed the
8 facts of the commitment offense, petitioner’s social and criminal history, his employment,
9 educational and disciplinary history while incarcerated, and his mental health reports, found
10 petitioner was not yet suitable for parole and would pose an unreasonable risk of danger to
11 society or threat to public safety if released from prison. (Resp’t Answer to Order to Show
12 Cause (“Answer”) Ex. A (Super. Ct. Pet.) Ex. A (Parole Hearing Transcript) at 94-106).)¹

13 After he was denied parole, petitioner filed a habeas petition in the Superior Court,
14 challenging the Board’s decision. In a minute order filed July 16, 2007, the Superior Court
15 denied relief, finding there was “evidence to support the [Board’s] conclusion of unsuitability
16 for parole and its denial decision.” (Answer Ex. B.) Petitioner next filed a habeas petition in
17 the California Court of Appeal. On August 23, 2007, the Court of Appeal summarily denied
18 the petition. (Answer Ex. D.) Petitioner then filed a petition for review in the California
19 Supreme Court; the petition was summarily denied on March 26, 2008. (Answer Ex. F.)

20 Petitioner next filed the instant petition, in which he claims the Board did not provide
21 him with a hearing that met the requirements of federal due process because (1) the Board’s
22 decision to deny parole was not supported by some evidence that petitioner at that time posed
23 a danger to society if released, but, instead, was based solely on the unchanging
24 circumstances of the commitment offense, (2) petitioner was denied the right to question a
25 witness at the hearing, and (3) the Board gave undue weight to a factually inaccurate mental
26 health report. Additionally, petitioner claims the Board violated his First Amendment rights

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28 ¹Unless otherwise noted, all references herein to exhibits are to exhibits submitted by
respondent in support of the Answer.

1 by requiring him to participate in two self-help programs based on religious principles,
2 specifically, Alcoholics Anonymous (“AA”) and Narcotics Anonymous (“NA”).

3 DISCUSSION

4 A. Standard of Review

5 A federal district court may entertain a petition for a writ of habeas corpus “in behalf
6 of a person in custody pursuant to the judgment of a State court only on the ground that he is
7 in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
8 § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on
9 the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a
10 decision that was contrary to, or involved an unreasonable application of, clearly established
11 Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a
12 decision that was based on an unreasonable determination of the facts in light of the evidence
13 presented in the State court proceeding.” 28 U.S.C. § 2254(d); see Williams (Terry) v.
14 Taylor, 529 U.S. 362, 409-13 (2000). Section 2254(d) applies to a habeas petition filed by a
15 state prisoner challenging the denial of parole. Sass v. California Board of Prison Terms, 461
16 F.3d 1123, 1126-27 (9th Cir. 2006).

17 Here, as noted, the California Court of Appeal and California Supreme Court both
18 summarily denied review of petitioner’s claims. The Superior Court thus was the highest
19 state court to address the merits of petitioner’s claims in a reasoned decision, and it is that
20 decision which this Court reviews under § 2254(d). See Ylst v. Nunnemaker, 501 U.S. 797,
21 803-04 (1991); Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir. 2005).

22 B. Petitioner’s Claims

23 1. Due Process Violations

24 Under California law, prisoners serving indeterminate life sentences, like petitioner
25 here, become eligible for parole after serving minimum terms of confinement required by
26 statute. In re Dannenberg, 34 Cal. 4th 1061, 1078 (2005). Regardless of the length of time
27 served, “a life prisoner shall be found unsuitable for and denied parole if in the judgment of
28 the panel the prisoner will pose an unreasonable risk of danger to society if released from

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1 prison.” Cal. Code Regs. tit. 15 (“CCR”), § 2402(a). In making the determination as to
2 whether a prisoner is suitable for parole, the Board must consider various factors specified by
3 state statute and parole regulations. In re Rosenkrantz, 29 Cal. 4th 616, 654 (2002); see CCR
4 § 2402(b)–(d). When a state court reviews a Board’s decision denying parole, the relevant
5 inquiry is whether “some evidence” supports the decision of the Board that the inmate poses
6 a current threat to public safety. In re Lawrence, 44 Cal. 4th 1181, 1212 (2008).

7 As noted, petitioner contends the Board’s denial of parole was constitutionally infirm
8 because (1) the Board’s decision was not supported by some evidence that petitioner at such
9 time posed a danger to society if released, but, instead, was based solely on the unchanging
10 circumstances of the commitment offense, (2) petitioner was not permitted to question a
11 witness, specifically, the Deputy District Attorney who attended the hearing and argued for
12 petitioner’s continued incarceration, and (3) the Board gave undue weight to a factually
13 inaccurate mental health report. All of these contentions constitute a single claim that
14 petitioner’s federal constitutional right to due process was violated by the Board’s decision to
15 deny him a parole date.

16 Federal habeas corpus relief is unavailable for an error of state law. Swarthout v.
17 Cooke, 131 S. Ct. 859, 861 (per curiam) (2011). Under certain circumstances, however, state
18 law may create a liberty or property interest that is entitled to the protections of federal due
19 process. In particular, while there is “no constitutional or inherent right of a convicted
20 person to be conditionally released before the expiration of a valid sentence,” Greenholtz v.
21 Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 7 (1979), a state’s statutory parole
22 scheme, if it uses mandatory language, may create a presumption that parole release will be
23 granted when, or unless, certain designated findings are made, and thereby give rise to a
24 constitutionally protected liberty interest. See id. at 11-12. The Ninth Circuit has determined
25 California law creates such a liberty interest in release on parole. Cooke, 131 S. Ct. at 861-
26 62.

27 When a state creates a liberty interest, the Due Process Clause requires fair procedures
28 for its vindication, and federal courts will review the application of those constitutionally

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1 required procedures. Id. at 862. In the context of parole, the procedures necessary to
2 vindicate such interest are minimal: a prisoner receives adequate process when “he [is]
3 allowed an opportunity to be heard and [is] provided a statement of the reasons why parole
4 was denied.” Id. (citing Greenholtz, 442 U.S. at 16.) “The Constitution,” [the Supreme
5 Court has held], “does not require more.” Id. (quoting Greenholtz, 442 U.S. at 16.)

6 Here, the record shows petitioner received at least the process found by the Supreme
7 Court to be adequate in Cooke. See id. (finding process adequate where petitioners “were
8 allowed to speak at their parole hearings and to contest the evidence against them, were
9 afforded access to their records in advance, and were notified as to the reasons why parole
10 was denied”). Specifically, the record shows the following: petitioner was represented by
11 counsel at the hearing (Answer Ex. A Part 1 Ex. A at 2:3-4); petitioner and his counsel were
12 provided in advance of the hearing with copies of the documents reviewed by the Board (id. at
13 8:4-9, 9:13-10:2); the Board read a summary of the commitment offense into the record
14 from the probation report, and also read a statement of petitioner’s version of the event (id. at
15 14:4-19:6); petitioner discussed with the Board his personal background, including his
16 insight into the commitment offense (id. at 19:7-36:5); the Board discussed with petitioner
17 the mental health reports prepared for the hearing, and petitioner’s achievements and
18 personal growth while incarcerated (id. at 36:24-51:1); petitioner’s counsel pointed out
19 factual errors in one of the mental health reports (id. at 51:2-54:18); the Board reviewed
20 petitioner’s disciplinary history while incarcerated, and discussed with petitioner his parole
21 plans and his ability to deal with life stressors outside of prison (id. at 55:10-79:12); both
22 petitioner and his counsel made statements advocating petitioner’s release (id. at 86:23-91:7);
23 petitioner received a thorough explanation as to why the Board denied parole (id. at 94-106).

24 Although petitioner maintains that, under the holding of Greenholtz, due process also
25 requires that a prisoner be allowed to call and question witnesses at a parole eligibility
26 hearing, petitioner is mistaken. As the Supreme Court noted in Greenholtz, such issue was
27 not before it and, consequently, the Supreme Court declined to express an opinion with
28 respect thereto. See Greenholtz, 442 U.S. at 16 n.8.

1 Further, because California’s “some evidence” rule is not a substantive federal
2 requirement, the weight the Board accorded the mental health report, and, indeed, whether
3 the Board’s decision to deny parole was supported by some evidence of petitioner’s current
4 dangerousness, is not relevant to this Court’s decision on the instant petition for federal
5 habeas corpus relief. Cooke, 131 S. Ct. at 862-63. The Supreme Court has made clear that
6 the only federal right at issue herein is procedural; consequently, “it is no federal concern . . .
7 whether California’s ‘some evidence’ rule of judicial review (a procedure beyond what the
8 Constitution demands) was correctly applied.” Id. at 863.

9 As the record shows petitioner received all the process to which he was
10 constitutionally entitled, the Court finds the Superior Court’s denial of petitioner’s due
11 process claims did not result in a decision that was contrary to, or involved an unreasonable
12 application of, clearly established federal law, and was not based on an unreasonable
13 determination of the facts in light of the evidence presented in the state court proceeding.
14 28 U.S.C. § 2254(d). Accordingly, relief will be denied on these claims.

15 2. First Amendment Violation

16 As noted, petitioner claims the Board violated his First Amendment rights by
17 requiring him to participate in two self-help programs based on religious principles,
18 specifically, AA and NA.

19 Although petitioner raised the instant claim in each of his state habeas petitions, no
20 state court has addressed the claim in a reasoned opinion. Where there is no reasoned
21 decision and, as here, the state court has denied relief, “it may be presumed that the state
22 court adjudicated the claim on the merits in the absence of any indication or state-law
23 procedural principles to the contrary.” Harrington v. Richter, 131 S. Ct. 770, 784-84 (2011).

24 Where the state court reaches a decision on the merits but provides no reasoning to
25 support its conclusion, the federal court conducts an “independent review” of the record. See
26 Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). An “independent review” of the
27 record “is not de novo review of the constitutional issue, but rather, the only method by
28 which [the federal court] can determine whether a silent state court decision is objectively

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1 unreasonable.” See id. In conducting such a review, “a habeas court must determine what
 2 arguments or theories supported or, . . . could have supported, the state court’s decision; and
 3 then it must ask whether it is possible fairminded jurists could disagree that those arguments
 4 or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.”
 5 Richter, 131 S. Ct. at 786. Where no reasoned decision is available, the habeas petitioner has
 6 the burden of “showing there was no reasonable basis for the state court to deny relief.” Id.
 7 at 784.

8 The record submitted herein does not support petitioner’s assertion that the Board
 9 required him to participate either in AA or NA in order to be found suitable for parole.
 10 Specifically, the record reflects the following: the Board noted that petitioner had previously
 11 participated in AA while incarcerated (Answer Ex. A Ex. A at 39:18-19) and that he was not
 12 doing so at the time of the subject hearing (id. at 48:26-49:2); the Board asked petitioner
 13 what else he was doing “to try to address [his] addiction” (id. at 49:2-3); the Board discussed
 14 petitioner’s participation in two prison self-help programs, specifically, the IMPACT and
 15 TRUST programs, and petitioner’s plans to continue in those programs or a church-
 16 sponsored program called Kairos should he be paroled (id. at 49:4-51:1, 71:2-17); the Board
 17 acknowledged that those programs could provide petitioner with benefits similar to those of
 18 AA and NA (id. at 75:9-13).

19 Additionally, the Board, in explaining to petitioner the reasons why he was being
 20 denied parole, stated the following:

21 We recognize that you did stop going to AA and NA back in ‘93, but you have
 22 found other outlets, but you need to continue doing this in order to face,
 23 discuss, under[stand], and cope with stress in a non-destructive manner. And
 24 we feel that unless more progress is made that you continue to be unpredictable
 25 and a threat to others. But again, we feel that you should be commended for
 26 quite a few thing[s], actually. Both of us talked about it, and [we] want to
 27 commend you for being up front and honest with us and being able to discuss
 28 some very painful issues from your past. [¶]

And, also, your willingness to explore alternatives for self-help because we
 didn’t get into it why you stopped the AA, NA, but you did seek out other
 avenues, okay, and that’s good and don’t stop there because if you’re not
 getting everything you need out of IMPACT or Kairos or whatever, there’s a
 lot of other things that are available to you to either group participate,
 individually, you might read a magazine article. You might see a video.

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1 Documentation means that you don't need to go somewhere to get tickets
2 stamped. If you write up a little paragraph to, you know, put a date on it, the
3 time you saw it, what it was, what was the purpose of it and what did you
4 personally get out of it. All you have to do is maybe write one or two
statements, all right, and be able to talk to a Panel about what did you walk
away with? What's the lesson that you learned that's specific to you that's
helping you to maintain that path to success.

5 (Answer Ex. A Ex. A at 100:12-101:18.)

6 Based on the above, the Court finds petitioner's claim that the Board has required his
7 participation either in AA or NA as a predicate to release on parole is factually unsupported
8 in the record. Accordingly, the Court concludes the state court's decision denying the instant
9 claim was neither contrary to nor an unreasonable application of clearly established Supreme
10 Court precedent. 28 U.S.C. § 2254(d).

11 C. Certificate of Appealability

12 A certificate of appealability will be denied with respect to petitioner's claims. See 28
13 U.S.C. § 2253(c)(1)(a); Rules Governing Habeas Corpus Cases Under § 2254, Rule 11
14 (requiring district court to issue or deny certificate of appealability when entering final order
15 adverse to petitioner). Specifically, petitioner has failed to make a substantial showing of the
16 denial of a constitutional right, as he has not demonstrated that reasonable jurists would find
17 the Court's assessment of the constitutional claims debatable or wrong. Slack v. McDaniel,
18 529 U.S. 473, 484 (2000).

19 **CONCLUSION**

20 For the reasons stated above, the Court orders as follows:

- 21 1. The petition for a writ of habeas corpus is hereby DENIED.
22 2. A certificate of appealability is hereby DENIED.

23 The Clerk shall enter judgment in favor of respondent and close the file.

24 **IT IS SO ORDERED.**

25 DATED: April 11, 2011

26 
27 MAXINE M. CHESNEY
28 United States District Judge